

[*Chalk v. Jerry L. Pettis Memorial Veterans Affairs Medical Center*](#), 97-ERA-4 (ALJ July 8, 1997)

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DATE: July 8, 1997
CASE NO: 97-ERA-4

In the Matter of:

JOSEPH BRUCE CHALK,
Complainant,

v.

JERRY L. PETTIS MEMORIAL
VETERANS AFFAIRS MEDICAL CENTER,
Respondent.

RECOMMENDED ORDER OF DISMISSAL

This matter arises under the employee protection provision of the Energy Reorganization Act of 1974 (the "Act" or "ERA") I 42 U.S.C. S 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. Complainant, Joseph Bruce Chalk, has appealed the determination of Linda M. Burleson, District Director, dated October 16, 1996, denying Complainant's complaint against Jerry L. Pettis Memorial Veterans Affairs Medical Center, Respondent.

Procedural History

This matter was originally assigned to Administrative Law Judge Edward C. Burch, who scheduled a hearing for December 9, 1996, at Long Beach, California. In an order dated December 5, 1996, Judge Burch granted the parties' joint motion for a continuance of the hearing.

On January 10, 1997, this matter was assigned to the undersigned administrative law judge. On February 24, 1997, the undersigned issued a Notice of Hearing and Pre-hearing order, scheduling a formal hearing for March 25, 1997, at Long Beach, California. The

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Order further ordered the parties to submit prehearing statements on or before March 14, 1997.

Respondent's Prehearing Statement and Motion for Summary Judgment was timely filed in this office on March 14, 1997. No prehearing statement was received from Complainant. Furthermore, Complainant did not file any reply to Respondent's motion for summary decision.

On March 24, 1997, the parties were informed via telephone that the hearing scheduled for the following day would be cancelled, based upon Respondent's motion for summary decision. This cancellation was confirmed in an Order Cancelling Hearing, issued on March 26, 1997. The order also granted Complainant until March 31, 1997, in which to file either a response to the motion for summary judgment, or a request for an extension of time in which to file said response. Complainant failed to file either document.

In an order issued April 23, 1997, the undersigned denied Respondent's motion for summary decision. The order gave Complainant until May 9, 1997, in which to file his prehearing statement, and requested that the parties contact this office to schedule a mutually convenient hearing date.

On April 30, 1997, Respondent's counsel contacted this office via telephone to discuss available hearing dates. In a letter dated May 1, 1997, Complainant contacted this office, requesting a continuance in this matter. Complainant noted that he is not represented by legal counsel, and that family matters had placed constraints on his time. He argued that these matters have hindered his ability to properly prepare for the hearing in this matter.

On May 8, 1997, the undersigned issued an Order Granting Extension of Time, granting Complainant's request. Complainant was given until June 9, 1997, in which to file his prehearing statement. In granting the motion, the undersigned forewarned both parties that 'no further extensions (would) be granted absent a showing of extreme good cause."

Again, Complainant failed to file his prehearing statement in accordance with the undersigned's order. Nor did Complainant attempt to contact this office to request another extension.

On June 20, 1997, the undersigned issued an order to Show Cause, which was sent to Complainant via certified mail, return receipt requested. Citing the applicable regulation for the dismissal of employee protection cases, 29 C.F.R. § 24.5(e)(4), the undersigned

ordered Complainant to show cause as to why his complaint should not be dismissed for failure to timely prosecute the same. Complainant was further ordered to respond on or before July 3, 1997. The U.S. Postal Service return receipt attached to this order indicates that it was received by Complainant on June 24, 1997.

As of the date of this order, Complainant has not complied with the undersigned's Order to Show Cause. In fact, Complainant has made no contact with office, via

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correspondence or telephone, since filing his request for an extension on May 5, 1997.

Discussion

The regulatory "Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes" provide as follows:

- (4) *Dismissal for Cause.* (i) The administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim
 - (A) Upon the failure of the complainant or his or her representative to attend a hearing without good cause;
 - (B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.
- (ii) In any case where a dismissal of a claims, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

29 C.F.R. § 24.5(e)(4)(1994). The Secretary of Labor has previously recognized that "[d]ismissal with prejudice is warranted only where there is a clear record of delay or contumacious conduct and a lesser sanction would not better serve the interests of justice." Billings v. Tennessee Valley Authority, 89-ERA-16, and 25, 90-ERA-2, 8, and 18 @ 3 (Sec'y July 29, 1992) (citing Consolidation Coal Company v. Gooding, 703 F.2d 230, 232-33 (6th Cir. 1983)). The Secretary has also approved an administrative law judge's recommended dismissal based upon the complainant's abandonment of his or her complaint. See Johnson v. Commonwealth Edison Co., 92-ERA-25 (Sec'y Sept. 23, 1992).

On two occasions now, Complainant has failed to comply with the undersigned's orders requiring him to file a prehearing statement in this matter. After the first such failure, the undersigned recognized that Complainant was unrepresented, and granted him another opportunity in which to file the same. The undersigned later granted an extension of this newest filing deadline at Complainant's request. When Complainant yet again failed to

comply with the undersigned's prehearing order, the undersigned issued an order to Show Cause, granting Complainant the opportunity to explain his failure. As of this date, Complainant has neither filed a prehearing statement nor shown good cause for his failure to do so.

The Secretary of Labor has previously found that a complainant's repeated

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failure to file a prehearing statement in compliance with an administrative law judge's orders constitutes "contumacious conduct" sufficient to warrant dismissal. Billings, @ 4. Based upon Complainant's failure to respond to the Order to Show Cause, the undersigned further finds that a lesser sanction would not better serve the interests of justice. As such, dismissal with prejudice is warranted. Moreover, Complainant's failure to make any communication with this office, despite numerous orders to do so, leads the undersigned to find that Complainant has abandoned the prosecution of his complaint.

RECOMMENDED ORDER¹

Based upon the foregoing, and in accordance with 29 C.F.R. § 24.5(e)(4), it is HEREBY RECOMMENDED that the above-captioned matter be DISMISSED WITH PREJUDICE.

SO ORDERED this 8th day of July, 1997, at Long Beach, California.

SAMUEL J. SMITH
Administrative Law Judge

NOTICE: This Recommended Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. See 61 Fed. Reg 19978 and 19982 (1996).

[ENDNOTES]

¹Although the language of 29 C.F.R. § 24.5(e)(4) appears to give an ALJ the authority to dismiss an employee protection provision case, the Secretary has held that dismissal orders are recommended decisions reviewable by the Secretary under 29 C.F.R. § 24.6.